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Walter F. Bugden,Jr.; Attorney for Appellant.

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UTAH COURT OF APPEALS
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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :

Plaintiff and Respondent, :

v. : Case No. 880680-CA

EUGENE MYERS, :

Defendant and Appellant. :

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APPELLANT'S BRIEF

----------oo0oo-------

Appeal from a final judgment entered in the
Third District Court for Salt Lake County,
State of Utah, the Honorable Frank G. Noel presiding

----------oo0oo-------

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IN THE UTAH COURT OF APPEALS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

JURISDICTIONAL STATEMENT

Jurisdiction is proper in this Court pursuant to U.C.A. § 78-2a-3(2), and Rule 4(a) of the Rules of the Utah Court of Appeals.

NATURE OF PROCEEDINGS

This is an appeal following the Appellant's entry of a guilty plea to the offense of Forgery, a second degree felony, in violation of U.C.A. § 76-6-501. Judgment was entered on the guilty plea on November 7, 1988 by the Honorable Frank G. Noel, Third District Court Judge.

STATEMENT OF ISSUES ON APPEAL

1. Whether the Defendant's guilty plea was received in compliance with Rule 11(e)(3) of the Utah Rules of Criminal Procedure and the decisional law construing that provision.

2. Did the Defendant receive effective assistance of counsel.

STATEMENT OF THE FACTS

On January 20, 1987, Barbara Harris was arrested at the Harmons grocery store after attempting to cash a check which was determined to be a forgery. While Ms. Harris was being detained, she was asked by the Harmons security guard if anyone was with her. She answered "that there was a gold car out in the parking lot with the other people that were with her." (8/16/88 T. 6).

Once a deputy sheriff arrived at the scene, the security guard advised him of the forgery situation inside the store and that accessories might be located in a suspect vehicle in the Harmons parking lot (8/16/88 T. 7-8). The deputy sheriff then pulled his patrol vehicle behind the gold cadillac which was the only gold vehicle in the parking lot (8/16/88 T. 7), activated his overhead lights, and stopped the gold vehicle. One female and one male occupant were observed in the vehicle. The Appellant was the male occupant. According to the security guard, permission was requested and given to search the vehicle by the Appellant (8-16-88 T. 11).

The Appellant's Motion to Suppress was denied. In announcing its ruling, the trial court stated that, "There was probable cause to make a stop. In any event, the court will deny the motion to suppress that evidence obtained pursuant to that arrest." (8/16/88 T. 36).

On September 12, 1988, the Appellant was scheduled to proceed to trial. At the request of Salt Lake County Attorney David Yocom, one of his former law partners, James Barber, appeared in court as counsel for the Appellant (9/12/88 T.2,3). The Appellant pleaded guilty to Count III of the Third Amended Information which alleged Forgery, a second degree felony, in violation of U.C.A. § 76-6-501. The court relied heavily upon a

guilty plea affidavit in receiving the guilty plea. There was no on the record compliance with Rule 11(e)(3) of the Rules of Criminal Procedure. The court ordered the Appellant to serve the indeterminate term provided by law of 1-15 years at the Utah State Prison. The Appellant is presently serving that sentence.

SUMMARY OF THE ARGUMENT

At the time that the Defendant entered his guilty plea, the law in Utah required strict compliance with Rule 11(e) of the Utah Rules of Criminal Procedure. Although the Appellant executed an Affidavit when he pleaded guilty which recited that a guilty plea necessarily waived an accused's rights to confrontation, to cross-examine the witnesses against him, to a jury trial, and to an appeal, the burden for ensuring Rule 11(e) compliance was squarely on the judge, and an Affidavit was not a sufficient substitute for Rule 11(e) compliance on the record at the time that the guilty plea was entered. The failure of the trial court to fulfill the requirements of Rule 11(e)(3) on the record at the time the Defendant entered his plea mandates setting aside the Appellant's guilty plea and conviction.

On the morning that the Appellant's case was scheduled to go to trial, a respected and experienced defense lawyer appeared in court at the request of the County Attorney to assist the Appellant. Although defense counsel should be commended for his

willingness to volunteer his services on short notice, he was, under the circumstances, incapable of rendering effective assistance to the Appellant. Counsel could not intelligently assess the propriety of the denial of the Motion to Suppress without reviewing the police reports and a transcript of the testimony at the suppression hearing. By pleading guilty, the Appellant waived his right to challenge the trial judge's denial of his Motion to Suppress. However, the stop of the Appellant's motor vehicle was not supported by an articulable suspicion; and as a result, the order denying the Appellant's Motion to Suppress was erroneous. Competent and effective counsel would not have presumed to advise an accused to plead guilty without a more thorough understanding of the search issue.

DETAIL OF THE ARGUMENT

POINT I

THE DEFENDANT'S PLEA WAS NOT ENTERED IN COMPLIANCE WITH RULE 11(e)(3) OF THE UTAH RULES OF CRIMINAL PROCEDURE, AND STATE V. GIBBONS

At the time that the Appellant pleaded guilty to Forgery, the trial court erred by failing to comply with the requirements of Rule 11(e)(3). That rule states as follows: "The court. . . shall not accept [a plea of guilty] until the court has made the findings: (3) that the defendant knows he has rights against compulsory self-incrimination, to a jury trial and to confront

and cross-examine in open court the witnesses against him, and that by entering the plea he waives all of those rights."

The record evidence from the change of plea hearing clearly establishes that the trial court failed to make a specific inquiry as to whether the Appellant understood that by entering his plea, he waived his rights against self-incrimination, to confrontation, to a jury trial, and to appeal. Failure to comply with the requirements of Rule 11(e)(3) necessitates setting aside the guilty plea.

In State v. Gibbons, 740 P.2d 1309 (Utah 1987), the Utah Supreme Court held that "Rule 11(e) squarely places on trial courts the burden of ensuring constitutional and Rule 11(e) requirements are complied with when a guilty plea is entered." Id. at 1312. Gibbons was decided on June 30, 1987. The Appellant pleaded guilty in the instant matter on September 12, 1988. Strict, and not just substantial, compliance with the rule is therefore required. State v. Vasilacopulos, 756 P.2d 92, 94 (Utah App. 1988). The record as a whole test applies only in pre-Gibbons cases. See Warner v. Morris, 709 P.2d 309 (Utah 1985).

The basis for the Gibbons duty imposed upon trial courts is found in Boykin v. Alabama, 395 U.S. 238 (1969), where the United States Supreme Court stated:

> [What is at stake for an accused facing punishment] demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence.
>
> 395 U.S. at 243-244.

In the instant matter, the trial judge relied heavily upon an affidavit which the Appellant signed and acknowledged that he had read (9/12/88 T. 4). Before accepting the Appellant's guilty plea, the trial court did review the possible penalty (T.6), as well as the elements and a factual basis for the guilty plea (T.6-7). However, the court never engaged in any conversation with the Appellant whereby the court informed the Appellant that by entering his guilty plea he would be waiving his rights against self-incrimination, to a jury trial, to appeal, or to confront the witnesses against him in open court. These rights were contained in the affidavit executed by the Appellant. However, the recitation of the rights in the affidavit does not satisfy the mandate of Gibbons and Vasilacopulos.

In Gibbons, the Utah Supreme Court imposed the burden of establishing compliance with Rule 11(e) squarely on the trial judge. Affidavits do not take the place of on the record compliance with Rule 11(e):

> The use of a sufficient affidavit can promote efficiency, but an affidavit should be only the starting point, not an end point, in the plead-

> ing process. . . . . The trial judge should then review the statements in the affidavit with the defendant, question the defendant concerning his understanding of it, and fulfill the other requirements imposed by section 77-35-11 on the record before accepting the guilty plea. (Emphasis added).
>
> Id. at 1313-1314

In State v. Valencia, 776 P.2d 1332, 1335 (Utah App. 1989), this Court repeated the requirement that the trial judge may not rely upon an affidavit as a substitute for on the record compliance with Rule 11(e):

> But, if such an affidavit or form is signed by the accused and used as part of the guilty plea to evidence his or her understanding of the charged offense and waiver of certain rights, that statement cannot serve as a mere substitute for the full and complete examination on the record by the trial court as required by the rule. (Emphasis added).

At the guilty plea hearing, the court did inquire, "Are you entering that plea voluntarily?" The Appellant responded in the affirmative (T.8). However, mere general questions which ask whether a plea is "voluntary" are insufficient under Rule 11(e). State v. Valencia, supra, at 1335. Indeed, as to a Rule 11(e)(3) deficiency, this Court in Valencia observed:

> Specific inquiry should be made as to whether defendant understands that by his plea he waives his rights against self-incrimination, to a jury trial, to appeal and to confront witnesses. . . . . Instead, the court relied only upon the form statement, which of itself was deficient, mandating that we reverse the

> conviction and the refusal to set aside the plea.
>
> Id. at 1335.

The Appellant has not moved to set aside his guilty plea at the trial court. The Rule 11(e)(3) error was only identified after the Notice of Appeal and original Docketing Statement were filed. Just as in Gibbons, if the motion were unsuccessful, an appeal would then be taken, resulting in two appeals in the same case. Additionally, in certain cases, this Court may consider the failure to comply with Rule 11 and Gibbons as error sufficiently manifest and fundamental to be first raised on appeal to this Court. State v. Valencia, supra, at 1332-1334. Accordingly, this Court should reach the merits of Appellant's argument. Appellant has established non-compliance with Rule 11(e)(3), thereby necessitating reversal of the conviction.

POINT II

THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL

In Strickland v. Washington, 466 U.S. 688 (1984), the United States Supreme Court established the standard for determining the existence of ineffective assistance of counsel. In order to prevail on such a claim, a defendant must show, first, that his or her counsel rendered a deficient performance in some demonstrable manner, which fell below an objective standard of reasonable professional judgment and, second, that counsel's perform-

ance prejudiced the defendant. Accord: State v. Carter, 776 P.2d 886, 893 (Utah 1989).

Deficient Representation

In the instant matter, the Appellant was represented by a variety of appointed counsel as well as at least one private counsel prior to the date set for trial. On the date of the guilty plea, the matter was actually scheduled for trial and the Appellant was representing himself. At the request of Salt Lake County Attorney, David Yocom, a former law partner, James Barber, appeared in court on the spur of the moment. Mr. Barber arrived to Court in casual attire. He explained his informal dress to the court as follows:

> May I apologize, your Honor, for appearing without the appropriate accoutrements. But I did so at Mr. Yocom's request and hope the court will condone that.
>
> (9/12/88 T.2).

Mr. Barber is an extremely able and well respected defense counsel. He is certainly to be commended for his willingness to drop everything and hurry over to court to assist a pro se defendant. However, in doing so, Mr. Barber undertook the responsibility of representing an accused (9/12/88 T.3). He had no familiarity with the facts, legal issues, or possible defenses that were available to the Appellant. Indeed, his only role was to stand beside the Appellant during the entry of the plea.

Under similar circumstances, the Utah Supreme Court ruled that the right to counsel was "not satisfied by a sham or pretense of an appearance in the record by an attorney who manifests no real concern about the interests of the accused." Alires v. Turner, 449 P.2d 241 (Utah 1969). In Alires, in response to the Defendant's request for counsel at the arraignment in the district court, the judge appointed an attorney who simply happened to be in the courtroom at the time. After a brief conference with the defendant, a guilty plea was entered. On appeal, in granting the Petition for a Writ of Habeas Corpus, the court agreed with the petitioner that the representation that he received was merely a perfunctory appearance for the record, and that he in effect had no counsel at all. Id. at 242.

From an objective standard, competent defense counsel would not presume to assess a criminal defendant's case in a matter of minutes before shepherding an accused through a guilty plea. In order to reach an intelligent judgment about the likelihood of prevailing on suppression issues or at trial, it would be necessary to take time to review the police reports in a given case. Moreover, in order to assess the Fourth Amendment violation, counsel needed to review a transcript of the testimony from the suppression hearing. No transcript had yet been ordered to that was clearly not done in the instant matter.

Prejudice

In order to prove prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, supra, at 964.

In the instant matter, the Appellant had a valid suppression issue to raise on appeal. However, by entering the guilty plea the Appellant waived his right to challenge the propriety of the trial court's denial of his motion to suppress. Because this Court had not yet decided State v. Sery, 758 P.2d 935 (Utah App. 1988), the Appellant could only preserve his suppression issue by going to trial. Absent the guilty plea and the waiver of the pre-plea denial of the motion to suppress, there is a reasonable likelihood of a different result because there was neither articulable suspicion nor probable cause to support the stop of the Appellant's vehicle.

The test for determining whether detainment is valid is whether specific and articulable facts exist which give rise to reasonable suspicion that the person stopped is or is about to be engaged in criminal activity. State v. Christensen, 676 P.2d 408 (Utah 1984). In announcing his ruling, the trial judge applied a

probable cause standard to determine the lawfulness of the stop of the Appellant's vehicle. The Appellant recognizes that the trial judge applied the wrong standard when evaluating the evidence in the instant matter. A brief investigatory stop is permissible when officers have reasonable suspicion, based upon objective facts, that an individual was involved in criminal activity. State v. Swanigan, 699 P.2d 718 (Utah 1985). In the instant matter, the Appellant submits that even if the trial court had applied the correct standard, there was an absence of articulable suspicion, based upon objective facts, which would have lead a reasonable and prudent police officer to conclude that either of the individuals in the Appellant's motor vehicle had been involved in the commission of the forgery perpetrated by Ms. Harris at the Harmons grocery store.

At the suppression hearing, the prosecutor, the Appellant pro se, and the trial court all endeavored to zero in on precisely what facts formed the basis of the security officer's belief that the individuals in the Appellant's vehicle might in some fashion be connected to the commission of the forgery inside the Harmons grocery store. The Appellant, at a loss to understand the security officer's logic in connecting the occupants of the vehicle with the crime committed inside the grocery store, asked the security officer the following question:

> Q: Then you're saying because Ms. Vigil [the arrested person] said there was a female out in a gold car and that was the only gold car out there, her mere statement of that lead you to believe that those were suspects in the crime that she had committed; is that your statement?
>
> A: It gave me probable cause to stop the vehicle to find out if it was connected with the crime that just occurred.
>
> (8/16/88 T. 15-16).

Although the facts available to the security officer at the time of the stop suggested that the arrested individual had come with the two individuals in the automobile, the officer was unable to articulate any facts which connected the individuals in the automobile with the commission of the forgery. The Appellant also asked the security officer the following question:

> Q: May I return to the other question and say that's the only reason you went out to stop that car, was because you wanted to see the people that Barbara Harris [the arrested person] was merely in that car?
>
> A: I wanted to find out who the additional suspects were. She stated there were other individuals with her.
>
> (8/16/88 T. 16).

Following the cross-examination of the security officer by the Appellant, the prosecutor gave the security officer yet another chance to articulate some facts to connect the individuals in the automobile with the commission of the forgery:

> Q: Mr. Roberts, did you have any indication from this individual who was later identified to you as Barbara Harris, any indication that the persons out in the gold car had anything to do with the check?
>
> A: Yes we did.
>
> Q: What was that?
>
> A: Ms. Vigil [later identified as Barbara Harris, the arrested individual] stated that she had come to the store with other parties; that there was a female party in the vehicle, and that there was a female and male party in the vehicle and they were with her.
>
> (8/16/88 T. 21-22).

Finally, even the trial judge asked the security officer whether he relied upon any additional facts besides the statement of the arrested individual that she had come with some other individuals in a car out in the parking lot:

> Court: Anything that was said that would lead you to believe these individuals were participants of the crimes?
>
> A: Before contact was made with the vehicle, I had contacted the Salt Lake City Police Department, Detective Division, as well as our Detective Division. And the information that was given to me was that there was several parties involved in a check--I think cashing these checks, that there were several different parties involved. And if it was possible to find a vehicle, stop it and find out who else was in the vehicle as they were accessories to this check writing situation.
>
> (8/16/88 T. 26-27).

Notwithstanding this testimony from the security officer, he still did not articulate any facts from which to conclude that the cashing of the check at Harmons on January 20, 1987 was connected in any way with the cashing of other checks on some earlier occasion. Moreover, the security officer testified that he thought he had been informed that there were several different parties involved. There was no elaboration by the security officer as to what the basis was to believe that there was more than one individual involved in the writing of checks.

The Appellant submits that the facts that were available to the security officer at the time the Appellant's vehicle was stopped did not amount to an articulable suspicion to believe that the individuals in the motor vehicle were involved with either the forgery at the Harmons, or any other forgery scheme. The decisional law in Utah supports this view. In State v. Carpena, 714 P.2d 674 (Utah 1986), a police officer was patrolling a neighborhood which had experienced a lot of burglaries. At 3:00 a.m. the officer saw a slowly moving vehicle with Arizona plates. The officer did not observe any traffic offenses. There had been no report of any recent burglaries in the area. The court held that the stop of the Arizona vehicle was unlawful. The court explained that there were no objective facts on which to base a reasonable suspicion of criminal activity.

The same is true in the instant matter. The Appellant submits that a two-tiered analysis of the facts available to the security guard is useful. The first tier of analysis can be restricted to the information provided to the security officer by the arrested individual. That information can fairly accurately be summed up as follows: A woman committed a forgery and when asked whether she had come with anyone else indicated that she had come with two individuals in a gold automobile in the grocery store parking lot. The Appellant agrees that these facts do constitute an articulable and reasonable basis to identify the Appellant's automobile as being the same automobile described by the arrested woman. However, the mere fact that the arrested woman had come to the parking lot with two other individuals does not amount to an articulable suspicion that the individuals in the automobile were connected in any way with the criminal activity which had occurred when the arrested woman perpetrated the forgery inside the Harmons store. The woman's statement does not provide an articulable basis to believe that the occupants of the vehicle solicited, requested, commanded, encouraged, or intentionally aided in the forgery. Indeed, nothing in the woman's statement even suggests that the occupants even knew that the arrested woman intended to commit a forgery. The law is well settled in Utah that mere presence at the scene of a crime with-

out any additional participation is insufficient to constitute accomplice liability.

The second tier of analysis can include the security officer's testimony concerning accomplice participation. It is interesting to note that the security officer never mentioned the accomplice information in answer to either the Appellant's or the prosecutor's questioning. Instead, the accomplice information was only added when the judge repeated the same inquiry about what information the security officer had available to believe that the individuals in the car were participants in the forgery. Even then, the security officer did not explain what the basis was to believe that the forgery committed at the Harmons was connected with any other forgeries, or what the basis was to believe that there was more than one individual involved in the other forgeries. Absent such a nexus, the Appellant submits that even with the accomplice information all of the facts available to the security officer did not constitute an articulable suspicion that the individuals in the vehicle were connected in any way with the forgery.

In announcing its decision to deny the Motion to Suppress, the trial court explained it was ruling (1) that the stop was supported by probable cause; and (2) that the "evidence obtained pursuant to that arrest" was admissable (8/16/88 T. 36). As

already stated, the Appellant concedes that the trial court applied the wrong standard. U.C.A. § 77-7-15 permits police officers to make a brief investigatory stop of an individual if the officers have a reasonable suspicion, based on objective facts, that the individuals are involved in criminal activity. However, in the instant matter, the stop of the Appellant's vehicle was not supported by an articulable suspicion. Moreover, because the trial court ruled that the challenged evidence was admissable as an incident of a lawful arrest, the Appellant was entitled to the suppression of the evidence as fruits of the poisonous tree. Wong Sun v. United States, 371 U.S. 471 (1963).

CONCLUSION

The failure of the trial court to fulfill the requirements of Rule 11(e)(3) on the record at the time the Appellant pleaded guilty necessitates setting his plea aside. Additionally, because the Appellant received ineffective assistance of counsel, his conviction should be reversed.

RESPECTFULLY SUBMITTED this _____ day of February, 1990.

EUGENE MYERS,
Appellant

WALTER F. BUGDEN, JR.,
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing, by first class postage prepaid, this _____ day of _____, 1990, to:

Sandra L. Sjogren
Assistant Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114

_____

APPENDIX 1

Rule 11. Pleas.

(a) Upon arraignment, except in case of an infraction, a defendant shall be represented by counsel, unless the defendant waives counsel in open court, and shall not be required to plead until he has had a reasonable time to confer with counsel.

(b) A defendant may plead not guilty, guilty, no contest, not guilty by reason of insanity or guilty and mentally ill. A defendant may plead in the alternative not guilty or not guilty by reason of insanity. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(c) A defendant may plead no contest only with the consent of the court.

(d) When a defendant enters a plea of not guilty, the case shall forthwith be set for trial. Defendants unable to make bail shall be given a preference for an early trial. In non-felony cases the court shall advise the defendant, or his counsel, of the requirements for making a written demand for a jury trial.

(e) The court may refuse to accept a plea of guilty or no contest and shall not accept such a plea until the court has made the findings:

(1) That if the defendant is not represented by counsel he has knowingly waived his right to counsel and does not desire counsel;

(2) That the plea is voluntarily made;

(3) That the defendant knows he has rights against compulsory self-incrimination, to a jury trial and to confront and cross-examine in open court the witnesses against him, and that by entering the plea he waives all of those rights;

(4) That the defendant understands the nature and elements of the offense to which he is entering the plea; that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt; and that the plea is an admission of all those elements;

(5) That the defendant knows the minimum and maximum sentence that may be imposed upon him for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences; and

(6) Whether the tendered plea is a result of a prior plea discussion and plea agreement and if so, what agreement has been reached.

If it appears that the prosecuting attorney or any other party has agreed to request or recommend the acceptance of a plea to a lesser included offense, or the dismissal of other charges, the same shall be approved by the court. If recommendations as to sentence are allowed by the court, the court shall advise the defendant personally that any recommendation as to sentence is not binding on the court.

(f) The judge shall not participate in plea discussions prior to any agreement being made by the prosecuting attorney, but once a tentative plea agreement has been reached which contemplates entry of a plea in the expectation that other charges will be dropped or dismissed, the judge, upon request of the parties, may permit the disclosure to him of such tentative agreement and the reasons therefor in advance of the time for tender of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether he will approve the proposed disposition. Thereafter, if the judge decides that final disposition should not be handled in conformity with the plea agreement, he shall so advise the defendant and then call upon the defendant to either affirm or withdraw his plea.

(77-35-11, enacted by L. 1980, ch. 14, § 1; L. 1983, ch. 49, § 6.)

Amendment Notes. — The 1983 amendment, in Subdivision (b), added "not guilty by reason of insanity or guilty and mentally ill" to the first sentence and added the second sentence.

Cross-References. — Inadmissibility of pleas, plea discussions or related statements, Rule 410, U.R.E.